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No. 88-1847

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.
DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal of Florida, First District

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce and the American Financial Services Association as *amici curiae* in support of the appellant in the above-captioned case and supporting reversal of the decision of the District Court of Appeal of Florida. Written consents of the appellant and the appellee have been obtained and filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of com-

merce. The Committee on State Taxation (COST), one of three advisory committees of the Council, consists of 354 corporate members. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

COST members are engaged in a diverse range of manufacturing, retailing and financial pursuits. Many of these companies are involved in extensive financing transactions that result in intangibles that are subject to taxation under a system such as that imposed in Florida. Moreover, all COST member companies, due to their interstate character, have an interest in this case which presents an issue regarding the role of the internal consistency test in Commerce Clause jurisprudence. COST is, therefore, vitally interested in a case such as this which presents issues significantly affecting state taxation of interstate commerce.

The American Financial Services Association (AFSA) is the nation's largest trade association representing nonbank providers of consumer financial services. Organized in 1916, AFSA represents 402 companies operating 10,970 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies. Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over $142 billion of consumer credit outstanding and over $50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The Appellant and other major automotive sale finance companies are members of AFSA and engage in transactions that result in intangibles subject to taxation under the Florida system. The vast majority of consumer

credit and wholesale financing are interstate in nature and are directly affected by such taxation.

SUMMARY OF ARGUMENT

At issue in this case is whether the Florida tax on intangible property violates the Commerce Clause in that it fails the internal consistency test, and, therefore, fails the fair apportionment and discrimination portions of the Commerce Clause test set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *reh'g denied*, 430 U.S. 976 (1977). This Court has held that whether a tax is fairly apportioned is determined by examining whether it is internally and externally consistent. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), *reh'g denied*, 464 U.S. 909 (1983). The internal consistency test has been applied by this Court in many contexts, *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 283, 284 (1987), and to various tax types.

The internal consistency test is one of fairness, *Container, supra*, at 169. It simply requires that a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. *Goldberg v. Sweet*, 488 U.S. ——, 109 S. Ct. 582, 589 (1989). The test ensures that a particular tax, on its face, will not result in multiple taxation in violation of the Commerce Clause. The viability of the internal consistency test and the appropriateness of extending this test to various tax types was most recently recognized by this Court in *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3032 (June 28, 1990).

When the internal consistency test is applied to Florida's intangibles tax, it is clear that the tax violates that test, and therefore, violates the Commerce Clause. Therefore, the decision of the Florida court must be reversed.

ARGUMENT

I. THE FLORIDA TAX VIOLATES THE INTERNAL CONSISTENCY TEST, AND, THEREFORE, VIOLATES THE COMMERCE CLAUSE

While States may tax interstate commerce, they may not, consistent with the Commerce Clause, impose taxes which discriminate against interstate commerce by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 458 (1959). This follows inexorably from the basic purpose of the Commerce Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). In order to enforce the protections offered by the Commerce Clause, this Court has developed a four-prong test, under which a State tax will be found Constitutional if it: 1) has a substantial nexus with the state; 2) is fairly apportioned to the activities carried on by the taxpayer in the state; 3) is nondiscriminatory; and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). At issue in the instant case is the second prong of the *Complete Auto* test, whether the Florida intangibles tax is fairly apportioned.

In determining whether a particular tax is fairly apportioned, this Court, in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 *reh'g denied*, 464 U.S. 90 (1983), stated that "[t]he first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency . . .". Internal consistency requires that a tax be structured so that if every State were to impose an identical tax, no multiple taxation would result. *Goldberg v. Sweet*, 109 S. Ct. at 589. The Florida intangibles tax is structured so that if every State were to impose the same tax, multiple taxation would result. Therefore, the tax is not fairly apportioned and, on its face, fails the Commerce Clause requirements as set forth by this Court.

Florida imposes its intangible tax on domestic and foreign corporations. In the case of a foreign corporation, this tax is imposed on all accounts receivable:

> wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state . . . it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid . . . Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state. . . . Fla. Stat. Sec. 199.112(1) (1983).

Thus, if a corporation domiciled in Michigan manufactures a product in Michigan, approves a purchase loan in Michigan, retains the loan documents in Michigan, receives and processes the loan payments in Michigan and merely delivers the product to the purchaser in Florida, Florida deems the entire value of the Michigan corporation's intangibles to be located in Florida for purposes of its intangible tax.

A Florida domicilliary corporation is required to pay the tax on all intangible property it owns, regardless of the location of the intangibles. Fla. Stat. Sec. 199.052 (1983). Florida's tax scheme, if imposed by other States, would result in multiple taxation in violation of the internal consistency test.

If Michigan, the commercial domicile of petitioner in the instant case, enacted a tax identical to that of Florida, all of petitioner's intangibles would be subject to tax by Michigan. However, under the Florida statute, intangibles that result from sales deemed to be Florida sales would also be subject to tax by the State of Florida on their unapportioned value.

Moreover, under the language of the Florida statute, an intangible is deemed to be a Florida sale and subject to tax by Florida even if the property securing the intangible is moved from the State. Thus, if an individual took delivery of property in Florida from a seller in Michigan and that individual subsequently moved the property to a third state which also imposed a tax on intangibles sitused in that state, the single intangible would be subject to tax on its entire value in three states! When the internal consistency test is applied to the Florida intangibles tax, it is clear that the tax would result in double or even greater multiple taxation. Therefore, the tax on its face fails the internal consistency test.

II. THE INTERNAL CONSISTENCY TEST, AS DEVELOPED BY THIS COURT, APPLIES TO AN INTANGIBLE PROPERTY TAX

This Court first used the term "internal consistency" in reference to whether a particular tax violates the Commerce Clause in *Container Corporation of America, supra.* In *Container*, this Court was considering whether an apportionment formula to be applied to the income for a unitary business was Constitutional. The Court stated that, under the Commerce Clause, an apportionment formula must be fair, stating further that:

> [t]he first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.

Id. at 169.

While the term "internal consistency" may not have been expressly used by this Court prior to its decision in *Container*, the Commerce Clause theory it represents had long been recognized by this Court. In *Pullman's Palace Car Company v. Pennsylvania*, 141 U.S. 18

(1891), the taxpayer challenged, on Commerce Clause grounds, Pennsylvania's imposition of its capital stock tax by apportioning the taxpayer's capital using a formula of the number of miles of Pennsylvania railroad over the total miles of railroad used by its cars. This court approved that apportionment formula as it "was a just and equitable method of assessment; and, *if it were adopted by all the States* through which these cars ran, the *company would be assessed upon the value of its capital stock, and no more.*" Id. at 26 (emphasis added). This is the same internal consistency test applied by this Court in *Container.*

Most importantly to the instant case, in *Pullman's Palace* this Court found that the tax at issue was "in substance and effect, a tax on . . . property." *Pullman's Palace, id*, at 25. Thus, not only did this Court apply the internal consistency test in a Commerce Clause context 100 years ago, but it also applied it to a tax it considered a property tax.

Further, this Court has recently explicitly applied the internal consistency test in contexts other than unitary income taxation. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *American Trucking, id.* at 283, 284, Pennsylvania's annual flat taxes on the operation of trucks within the State was held unconstitutional under the Commerce Clause because the taxes violated internal consistency, thus potentially resulting in multiple taxation. In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987), this Court invalidated similar Business and Occupation taxes imposed by the States of West Virginia and Washington. If every state had a tax similar to those of West Virginia and Washington, manufacturers and wholesalers engaged in interstate business would have a heavier tax burden than wholly in-state manufactures and wholesalers. Therefore, the taxes failed the internal con-

sistency test and were found to violate the Commerce Clause.

This Court has never restricted the application of the internal consistency test to any particular tax type. In fact, the test was first developed as a Commerce Clause requirement in a property tax case and the test has been applied in various tax contexts. In accord with the prior decisions of this Court, the internal consistency test must be applied in determining whether Florida's intangible property tax violates the Commerce Clause in the instant case.

III. THE FLORIDA INTANGIBLE PROPERTY TAX INHIBITS INTERSTATE COMMERCE BY BURDENING FINANCING TRANSACTIONS OF INTERSTATE BUSINESSES

The internal consistency test is vitally important to the national economy. Its role in identifying the potential for multiple taxation is essential in preventing the States from overreaching and placing tax burdens on interstate businesses that they are unwilling to place on domestic businesses. It is the internal consistency test that ensures that a particular tax will not burden interstate commerce in violation of the Commerce Clause.

Clearly, the Florida tax on intangibles is structured to discourage out-of-state businesses from engaging in financing transactions in the State, thereby favoring local finance companies, since an out-of-state business risks multiple taxation that the local business avoids. While competition among the States for a share of interstate commerce is a central element of our free-trade policy, a statute may not tax interstate transactions in order to favor local businesses over out-of-state businesses. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Florida's intangibles tax scheme is structured to provide a disincentive for non-Florida finan-

cing corporations to do business in the State, creating a monopoly for Florida businesses. It is just such commercial advantage to local business that the Commerce Clause is intended to prevent. The internal consistency test is designed to identify tax laws that violate that essential purpose of the Commerce Clause.

The utility of the internal consistency test in providing a first line of defense from discriminatory State taxation has been well demonstrated by the decisions of this Court. Its application to the Florida tax at issue, thereby invalidating that tax, is necessary to prevent multiple and discriminatory taxation of interstate businesses in violation of the Commerce Clause.

CONCLUSION

For the foregoing reason, the Committee on State Taxation and the American Financial Services Association respectfully request that the decision of the First District Court of Appeal of the State of Florida, upholding the constitutionality of the State's tax on intangible property, be reversed.

Respectfully submitted,

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